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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

Nos. 1104-1105

WILLIAM MILBURN,

Petitioner,

vs.

MARTHA HEALD and ORLAND HEALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER

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MAY IT PLEASE THE COURT:

Respondent's contention that the inspection made by defendant's employe was inadequate is not supported with authority or by the evidence (Opp.'s Br. 2, 3). Instead respondents themselves, with pretended authority, declare that the inspection was inadequate as against the opinions testified to by the mechanics of years of experience who were witnesses in the case.

Roy Thomas, the mechanic who inspected defendant's car when it was taken in trade by the firm, had been a mechanic for that firm for four and one-half years (Tr.

243). He testified that he was an automobile mechanic and knew what it was necessary to do with a car to make it safe for use on the highway (Tr. 246). The car in question looked O. K. to him upon inspection (Tr. 243), and when he put it in the used car lot it was the average 1934 Chevrolet (Tr. 244). The inspection at the garage in LaGrange was made by Floyd Baker who had been an automobile mechanic for eighteen years (Tr. 152, 154). He testified that a mechanic runs across many automobiles that have a creaking noise caused by loose nuts on the bolts that hold the wheel to the axle drum. This evidence is not controverted.

It is our contention that these inspections represent an effort by the defendant to keep his car in a safe operating condition, that certainly satisfies the requirements of a reasonable inspection and therefore the defendant is not liable for injuries to the respondents resulting from the undisclosed condition of his car.

It is of course easy to argue after the fact that the mechanic who made the inspection should have tested the nuts and bolts on the car. There is no evidence in the record that such an inspection would have disclosed a defect, but on the contrary the evidence shows that such a defect could not have been ascertainable. The evidence shows that the nuts were tightened to the bolts two hours before this accident occurred, and the mechanic, having no interest in this controversy, told the defendant that the car was "O. K." (Tr. 154.)

Respondent's insistence that if a nut can be pulled through a hole (Opp.'s Br. 3), the hole must be larger than the nut, and that if the hole had been worn larger than the nut after the collision it must have been so when the nut was tightened two hours before the collision, answers itself. The point is that the evidence showed that Baker, the mechanic, who tightened the

nuts on those bolts, pronounced the wheel O. K. There is also the corroborative testimony of Mahoney, also disinterested, who was present at the time it occurred (Tr. 158, 159).

Respondent's brief, page 4, seems to infer without saying so that the defendant was drunk at the time the wheel was repaired, and that for this reason his drunkenness was an issue in the case. It is to be noted that there is no reference to the record. Actually the only evidence on the subject was that the defendant was not intoxicated at that time. Both Baker and Mahoney testified that the defendant was perfectly sober (Tr. 154, 159).

Therefore, if the right to recover in this case is based upon the theory of negligence in the failure to make an adequate inspection, the question of the defendant's intoxicated condition is not even in issue, and the jury should have been permitted to pass in a dispassionate manner on the question whether or not the inspection was adequate.

Respondents dwell at great length on defendant's behavior following the collision for the purpose of showing defendant was drinking and how drunk he was (Opp.'s Br. 15). This lurid description must be somewhat discounted. It is a matter of common knowledge that the behavior of one who has just been in a violent collision is not normal. Defendant's behavior for a large part is as symptomatic of shock and pain as it is of drunkenness and in no way measures the extent to which the defendant was under the influence of liquor, if at all, immediately preceding the collision. Two witnesses on the scene of the accident, Sorenson (Tr. 163, 164) and Keefer (Tr. 143) both testified that the defendant was sober. Keefer accompanied Milburn when he was taken to the Kane County jail (Tr. 174) and

thought that the defendant was dazed from the accident. Obviously the defendant could not deny his behavior following the collision when he remembered nothing from the time of the impact until he heard the officer say, "Get into the car." (Tr. 187.) He also testified that he was not intoxicated.

Therefore, there are five witnesses who testified that the defendant was not intoxicated. Only the defendant himself was an interested witness. Keefer and Sorenson saw him at the scene of the accident and Baker and Mahoney shortly prior thereto. Certainly there is a fact issue here present which the defendant was entitled to have the jury construe in a calm and dispassionate manner. Especially is this true since respondents themselves both testified that as the defendant's car approached there was nothing about the manner in which it was being driven which attracted their attention (Orig. Br. 14). If it was being driven in a proper manner upon the highway, then even though the defendant was intoxicated there would be no liability as respondents admit in their brief. This presents the question whether or not the defendant's intoxication, if he was intoxicated, was the proximate cause of the injury, another question which defendant was entitled to have the jury pass upon in a calm and dispassionate manner.

These are the fact issues which constituted the defense that was characterized as being dishonest, miserable, unfair and untrue. As shown in our original brief, the theory that the wheel coming off of defendant's car was the proximate cause of the collision was presented by the respondents themselves in their pleadings (Orig. Br. 16), and there was no justification in the record which characterized this theory or any of the defendant's theories on the facts as being dishonest, miserable, unfair and untrue. This charge was not a comment on

the evidence; it was a characterization of our entire defense. As we have shown in our original brief it stated no reasons why the charge could be considered justified (Orig. Br. 19). It was a blanket charge that all of defendant's witnesses were untruthful.

The cases cited by respondents in their brief do not authorize such argument. For example, the cases of *Commonwealth Electric Co.* v. *Rose,* 214 Ill. 545, 561, 562, quoted by respondents (Opp.'s Br. 9) shows that counsel may arraign the conduct of the parties and impugn, excuse, justify or condemn motives only so far as they are developed in the evidence and assail the credibility of witnesses when it is justified by impeachment, inconsistency, incoherency, or the manner of testifying, or by appearances or circumstances. It is true that a just and fierce invective is not discountenanced by the court, but it must be based upon facts in evidence.

Again *Chicago U. T. Co.* v. *O'Brien,* 219 Ill. 303 (Opp.'s Br. 10), shows that the right of counsel to denounce a witness as unreliable or untruthful is permissible only when the testimony is subjected to the tests for determining his credibility.

If the remarks objected to were based upon the evidence and constituted a discussion of the evidence, we would have no complaint. But instead of doing so the argument charged all of the witnesses for the defense and defense counsel as well with being dishonest. It is, therefore, not a proper argument, and even the cases cited by respondents show that it is improper.

In a further attempt to excuse the argument respondents try to evade the issue by attacking the argument of the defense to the jury (Opp.'s Br. 8, 9). But that is not what the argument characterized. Counsel was characterizing our whole defense. He was not criticizing the handling of the case or any incidents of the trial.

Moreover, there is no question of the propriety of the defendant's argument to the jury. There was nothing improper in the statement that the complaint did not charge the defendant with driving a car while under the influence of liquor. Such was the fact, and there is a statute in Illinois making it unlawful to so drive a car. When it is considered that every other conceivable statutory violation was declared upon by respondents, it would seem that if they intended to claim that the defendant was operating a car while under the influence of liquor, the complaint would have so alleged. Especially is this true if the complaint was to inform us of the case which we were being called upon to defeat.

As a matter of fact, we were surprised and thought we had a point which we strenuously raised upon the trial (Tr. 13, 14, 15). Only a thorough research of the authorities after the trial convinced us that our point was untenable. Also it was a fact that the cross-examination of Dr. Conley was inaudible, so inaudible that one of the jurors asked him to speak louder. It was a further fact that Mrs. Jackson was in plaintiffs' counsel's office with Mrs. Olson and Mr. Yarnell discussing the case. Mrs. Jackson was at the scene of the accident all of the time that Mrs. Olson was there, and even after Mrs. Olson left (Tr. 80). Certainly we had a right to comment upon the failure of the plaintiffs to call Mrs. Jackson as a witness, particularly after the emphatic testimony of Mrs. Olson and the vehement testimony of Mr. Yarnell who would not discuss the accident with us when we tried to interview him. It was a fact that the plaintiff was a court reporter in Nebraska, and it is fairly reasonable from the evidence that he has seen people with crutches walk out of courts with more money than those who walked in without them. This is particularly true when it is considered that Drs. Conley and Zeitlin, both outstanding reputable

orthopedic surgeons, testified that the crutches were unnecessary (Tr. 226, 274). However, the point is that these comments were comments on the evidence and incidents of the trial.

The vituperative and intemperate remarks of respondents' argument to the jury were charges that all of our witnesses were perjurors, and the inference was left with the jury that we also were aiding and abetting in the defense of a case which was miserable, unfair and untrue. It ceases to be a court of justice when an argument can be made without any basis in the evidence or in the incidents of the trial which arraigns the entire case of the adversary and where an attorney is permitted to loudly exclaim to the jury that his blood boils because the defendant insists upon his constitutional right of a trial by a jury of his peers in which no substantial error shall intervene to his prejudice and which should be conducted in an atmosphere conducive to dispassionate discussion by the jury when they retire to consider their verdict. Even a defendant in a criminal case, however guilty, is entitled to have his case decided upon a record devoid of intemperate and unwarranted accusations. Certainly no one is in a position to say that it is harmless error when a jury is told that the defense of a case is dishonest, miserable, unfair and untrue, that it is a lie which will fit only into another lie, and that it makes the blood of plaintiffs' counsel boil to have to sit and listen to it.

Regarding their injection into this case of evidence that defendant was arrested and taken to jail respondents content themselves with the general assertion that this evidence was a necessary part of the testimony (Opp.'s Br. 12). Why it was necessary is not stated. It is not shown in what respect the evidence was relevant, except to suggest to the jury that if the defendant

was arrested and taken to jail it must have been because he was drunk (Opp.'s Br. 12). It is precisely because this conclusion does not follow that the evidence was not relevant. Because one is inclined to draw this false conclusion, as respondents here demonstrate, this type of evidence is highly prejudicial and the respondents should never have introduced this subject in examining the witness Smith and the witness Crawford (Tr. 20, 21, 29, 30). Over our repeated objections Crawford was permitted to testify in response to respondents' improper direct examination that defendant was arrested and taken to jail (Tr. 29, 30). It was in an attempt to counteract the prejudicial effect of this testimony and thereby avoid the inconvenience of a second trial that we inquired of Crawford on cross-examination in order to show the outcome of the criminal proceeding whether he had testified in any other proceeding against the defendant (Tr. 32).

It was not for the purpose of opening up the subject of the criminal proceeding that we made this inquiry as respondents would have this court believe (Opp.'s Br. 12). There is no question on the record but that the issue with respect to arrest was opened up by respondents. Then, unwilling to yield their unfairly gained advantage, they proceeded to frustrate defendant's counteractive measures by attempting to show that the criminal proceedings were *nolle prossed* through their good graces and intervention, which was not the fact. Now, they stand in this court and say petitioner introduced the subject.

Reed v. *Alton Water Co.*, 301 Ill. App. 219, cited apparently to show that evidence that a man was brought to a police station and locked up is relevant to the issue of intoxication, does not touch that point, though plaintiffs, by a distorted statement of the case, would have

this Court believe that it so holds. The point was never before the Court and the Court never decided the evidence was admissible. Apparently it went in without objection. The rule is well settled in Illinois that a judicial opinion, like a judgment, must be read as applicable to the facts involved and is an authority only for what is actually decided. (*People ex rel. Shuler* v. *Chapman,* 370 Ill. 430, 435; *White* v. *Seitz,* 342 Ill. 266, 270.)

Respondents cite *Nelson Construction Co.* v. *Ind. Com.,* 286 Ill. 632, 637, and other cases (Opp's Br. 13, 14) to support the proposition that we cannot complain of the error in the admission of the evidence relating to the defendant's arrest on the spot by a constable and subsequent removal and incarceration in jail. These cases do not support their position. The *Nelson* case was a case where incompetent evidence of a witness was objected to by a party and his objection was sustained. Thereafter, on cross-examination of the same witness, the party whose objection was sustained elicited the incompetent evidence in response to questions asked without making any motion to exclude such evidence. The Supreme Court of Illinois held that such party could not complain that such evidence is incompetent. The inapplicability of this and the other cases cited is obvious. Here we went into the question only after respondents' improper evidence was introduced and only after the issue thereon was made up by the rulings of the trial court.

Kortylak v. *Johnston City Bldg. & Loan Assn.,* 279 Ill. App. 88 (Opp's Br. 13), is rather ambiguous. If it holds that a party after objecting to certain evidence and having his objection overruled proceeds to offer similar evidence to rebut the evidence erroneously admitted over his objection, waives the point of his objection by offer-

ing the similar evidence, it is not in accordance with the well-settled rule in Illinois as laid down by its Supreme Court. All that the remaining cases cited by respondents hold is that a party cannot complain of erroneous evidence admitted by his adversary where he himself has offered similar evidence. But where a party initially objects to the admission of evidence and his objection is overruled (as in the case at bar), he does not thereby waive his objection by offering similar evidence to rebut the evidence erroneously admitted over his objection. That is the point here because there would have been no evidence with respect to criminal proceedings at all if respondents had not brought out the fact initially, which was admitted by the Court, that the defendant was arrested, taken to jail and incarcerated. Over our objection the trial court ruled this evidence admissible and under the law we had the right to offer evidence in rebuttal. *Chicago City Railway Co.* v. *Uhter,* 212 Ill. 174 (Orig. Br. 33, 34 and other cases there cited).

Neither are respondent's contentions sound that the evidence in question was admissible. *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174 (Orig. Br. 32) does not hold the evidence admissible as respondents infer but holds the evidence inadmissible and cites for its authorities *Luby* v. *Hudson River Railroad Co.,* 117 N. Y. 131, which respondents do not discuss at all. Respondents say that our authority, *Cammarano* v. *Giemino,* 234 Ill. App. 556, is not authoritative because the Illinois Supreme Court has decided otherwise, but cite no Illinois Supreme Court authority wherein the decision is otherwise. They also say that the question of evidence of the arrest of the defendant in the civil proceeding was not involved in the *Cammarano* case. Technically that is true because what was involved was whether a conviction in a criminal case was admissible. Obviously, if you could not prove in a civil case that the defendant had been con-

victed of a similar charge in a criminal proceeding growing out of the same subject matter, you could not prove in a civil suit that he had been arrested. Certainly his conviction is much stronger evidence of the fact of his guilt than his arrest for the crime. The reason why evidence of arrest and subsequent criminal proceedings is inadmissible in a civil suit is because of the element of prejudice. We submit that the *Cammarano* case is decisive here and this court in examining that opinion will note the many Illinois and foreign authorities cited by the court to support the conclusion reached.

Chicago City Ry. Co. v. *Reddig,* 139 Ill. App. 160, is really authority for our position inasmuch as the basis of the holding is to get away from the possibility that a jury will infer blame from the arrest. In addition, the question of the admissibility of the evidence of arrest was not before the court. The question before the court was whether or not the reason for the arrest was admissible and the statement made by the court with respect to the evidence of arrest was dictum. The same court subsequently decided the *Cammarano* case and there is no question about the status of the Illinois law at this time (Orig. Br. 35).

In our opinion the nub of the whole case is set forth by respondents on page 15 of their brief. There they admit that the fact that petitioner was arrested for drunkenness would not of itself prove any fact in issue in the case for the reason that petitioner might have been drunk and still not be guilty of negligence. Although respondents do not say so, petitioner might have been arrested although not intoxicated. If the petitioner, though drunk, was not guilty of negligence, then the evidence of his drunkenness would be absolutely immaterial and irrelevant to the issues in the case. Then why the undue emphasis on that issue?

Secondly, whether drunk or sober, petitioner's arrest would not be proof of the fact even in a criminal proceeding, much less in a civil case. But respondents were not content even to try the issue of drunkenness in this case. They say (Opp.'s Br. 15) what would have been the inference if they had not shown that the officers did their duty. Conversely, what is the inference arising from the arrest? The issue whether defendant was drunk or sober was a contested fact issue for the jury in this case to decide, but respondents insist upon having that issue decided by the officer on the scene of the accident.

Upon the whole record there is serious question whether the petitioner's alleged intoxication had any causal relation whatsoever to the accident for the reason that he was not guilty of negligence. It must be apparent that the undue prominence accorded to the issue of intoxication and the petitioner's arrest was for the purpose of creating a favorable background against which to try the issues of this case. In other words, that the petitioner must have been drunk or he would not have been arrested and that since he was drunk and an accident happened, the drunkenness must be the cause. Therefore, liability. And this is the atmosphere and stage dressing in which we were compelled to submit the issues of adequate inspection and proximate causation. When added to this you have the unfounded charge that the defense of adequate inspection and no proximate causation is dishonest, miserable, unfair and untrue, which charge receives a tacit consent and approval of the trial court, how could the jury calmly and dispassionately consider the issues presented?

The errors are unquestionably prejudicial. We know of no doctrine that "any trial" is good enough for a "dishonest, drunken man." This was a court of justice

and the petitioner, drunk or sober, was entitled to have the issues decided according to the established rules of law and procedure. He was not asking for more than his legal right when he asked for an opportunity to be heard. And he was entitled to be heard in a calm and dispassionate manner, in a trial free from prejudice. He was not given that right, and in justice we submit that this court should review the case.

Respectfully submitted,

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